UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

AIRGAS USA, LLC

and **Cases 31–CA–226568**
31–CA–260895

INTERNATIONAL BROTHERHOOD OF TEAMSTERS WHOLESALE DELIVERY DRIVERS, GENERAL TRUCK DRIVERS, CHAUFFEURS, SALES, INDUSTRIAL AND ALLIED WORKERS LOCAL 848

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for the General Counsel.

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Mark M. Stubley, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart P.C.), for the Respondent.

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for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. At issue in this case is whether Respondent Airgas USA, Inc. (Respondent or the Employer) violated Section 8(a)(3) and (1) of the Act by withholding a wage increase to a unit of employees whom the Union, Teamsters Local 848 (the Union or Charging Party) was seeking to represent and was later selected to represent; and whether Respondent violated Section 8(a)(5) and (1) of the Act by changing employee schedules, reducing hours, reducing overtime pay, and laying off an employee without giving prior notice or affording the Union an opportunity to bargain about such changes.

I. Procedural Background

Based on charges in Cases 31–CA–226568 and 31–CA–260895 filed by the Union on August 29, 2018 and October 1, 2020, respectively, the Regional Director for Region 31 of the

Board issued a fourth consolidated complaint on April 5, 2021, alleging that Respondent had violated the Act in the manner briefly described above.[1] A hearing was conducted on this matter via the ZoomGov video platform on May 3 through 6, 2021.

II. JURISDICTION

The complaint alleges, and Respondent admits, that at all material times, Respondent has been a limited liability company with an office and place of business in Burbank, California, where it is engaged in the business of distributing industrial, medical, and specialty gases. The complaint further alleges, and Respondent admits, that during the 12-month period ending June30, 2020, Respondent, in the course of its business operations, purchased and received at its Burbank facility goods valued in excess of $50,000 directly from points outside the State of California. Accordingly, I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint also alleges, Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. FINDINGS OF FACT

A. Background Facts

Many of the facts surrounding the events at issue herein are not in dispute, and indeed the parties entered into numerous joint stipulations and to admit numerous related documents with regard to those facts, as I will briefly summarize below.[2] As briefly described above, Respondent is a national company engaged in the business of distributing industrial, medical, and specialty gases throughout the United States. The company is divided into five geographical divisions, each in turn divided into regions and separate areas within those regions. Its Burbank facility (the facility), which is at the center of the dispute in this case, is part of the west region within the west division, and is located in the "North of Los Angeles" (NOLA) area of the west region. Besides management and salespersons, the employees at the facility primarily consist of the truckdrivers who deliver the product to the customers (primarily gas cylinders), and the production employees who load the gas into the cylinders and the cylinders unto the trucks. The parties agreed that the following individuals were supervisors and/or agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act:

- Sulma Garcia, Operations Manager (7/22/2018-5/26/2019)

[1] Previous complaints had issued on these and other related charges, containing numerous other allegations. These other charges and allegations, however, were the subject of settlement agreement(s) between the General Counsel and Respondent and were accordingly withdrawn and rescinded in accordance with the terms of said settlement(s). I see no need to provide a detailed account of the other charges, complaints and settled allegations, nor the motions or orders related to those charges and complaints but note that these documents are part of the formal papers admitted herein as General Counsel's Exhibit 1(a) through 1(kkkk), with GC Exh. 1(kkkk) being an index and description of the formal papers.

[2] Joint Exhibit 1 (Jt. Exh.1) contains a summary of the stipulated facts and corresponding joint exhibits, through [Note: NLRB Style Manual's abbreviation for Joint Exhibit is Jt. Exh.] Joint Exhibit 34 (Jt. Exh. 34) agreed to between the parties.

- Ron Rydzewski, District Manager
- Elvis Herrera, Distribution Manager
- Shant Zakarian, Director-Attorney (7/17/17-5/17/2019)
- J.R. Brees, Area Vice President, West Region
- Gerardo Ruiz, Area Branch Operations Manager
- Daniel Rodriguez, Operations Manager (10/13/2019- present)
- Gonzalo Guzman, Assistant Plant Manager
- Michelle Hernandez, Human Resources Manager
- Adrienne Johnson, Human Resources Director
- Ruben Perez, Area Operations Manager
- Michael Murphy, Vice President and Counsel
- David Gonzalez, Director-Attorney (12/12/2016-06/05/2020)
- Laureano Castillo, Operations Manager (2015-7/21/2018)

During July and August 2018,[3] the Union began organizing a unit of employees primarily composed of the drivers at the facility, and on August 27 the Union filed a petition with the Board seeking to represent the employees.[4] Pursuant to the petition, the Board held an election on September 20 in which the Union received a majority of the votes. On October 11, the Regional Director certified the Union as the collective-bargaining representative of the employees in the above-described unit. The events that occurred following the filing of the petition and the subsequent certification of the Union is at the heart of the instant dispute, as discussed below.

B. The Wage Raises

The complaint alleges, inter alia, that Respondent failed to give the drivers in the bargaining unit a wage raise in *October* 2018 for discriminatory reasons, an allegation disputed by Respondent.[5] The record shows as follows regarding the history of wage raises prior to 2018 and the events surrounding the wage raise given to production (non-bargaining unit) employees in 2018, but not to the bargaining unit drivers.

First, the uncontroverted. The parties jointly introduced documents that show that for the 4-year period from 2013 through 2017, Respondent gave across-the-board wage increases to both production employees and drivers ranging, approximately, from between 2 to 4 percent, with a few limited exceptions that were either below or above those thresholds (Jt. Exhs. 1 through 6). Additionally, documents show that in October 2018 *only* production employees received a wage increase, ranging from approximately 2 to 3 percent (Jt. Exh. 7(a) & (b)). It is

[3] All dates here after shall be on calendar year 2018, unless otherwise specified.

[4] The petition by the Union sought to represent the following employees: All full-time and regular part-time route drivers, distribution drivers, inventory specialists and dispatchers with commercial driver licenses employed by [Respondent] working out of its facility currently located at 10675 W. Vanowen St., Burbank, CA 91505; Excluded: All other employees, office clericals, professional employees, confidential employees, managerial employees, guards, and supervisors as defined by the Act, as amended.

[5] Complaint par. 7(a). The word October is emphasized above because Respondent had previously granted another, larger, wage increase to production employees on September 3, 2018, and the failure to grant drivers that September wage increase is not alleged as a violation, as discussed below.

also uncontroverted that the (bargaining unit) drivers did not receive a wage raise in 2018, but the reasons therefor are disputed, as discussed below. Additionally, although there is no documentary evidence on the record regarding the years prior to 2013,[6] testimonial evidence strongly suggests that prior to 2013 Respondent had likewise given across-the-board wage increases to its production employees and drivers on a regular basis. Thus, Driver Victor Mendoza, employed by Respondent since 2004, testified that employees received wage increases every year, toward the end of the year, typically in October (Tr. 297). Driver Gilbert Huerta, also employed since 2004, supported Mendoza's testimony regarding the yearly increases, although he remembered that these increases occurred at different times of the year, such as April, October, and sometimes June (Tr. 332–333). Driver Manuel Hernandez testified that during his hiring interview in 2017, Plant Manager Laureano Castillo informed him that he would receive a $1 (per hour) increase on his first year anniversary, another $1-increase on his second anniversary, and smaller "cost of living" increases each October thereafter.[7] Neither Mendoza's, Huerta's, nor Hernandez' testimony was contradicted nor negated in any way. In this regard, I would note that Scott McFarland, Respondent's vice president of operations for the West Region, and the person responsible for determining individual wage adjustments from 1997 through 2017, testified that there were no wage increases every year—but could only point to 2009 as the lone example of a year when there was no wage increase (Tr. 584).[8] Accordingly, I conclude that in addition to the established wage raises from 2013 through 2018, a strong inference exists that Respondent granted its employees yearly wage increases since 2004, with the possible exception of 2009.

The wage raises granted to the production employees in 2018 came on two separate occasions within a month of each other. The first of such raises, deemed a "Market Adjustment" raise, was granted on September 3, and was by far the larger of the two, ranging anywhere from $1.54 to $2.60 per hour, representing about a 6 percent to slightly above 11- percent increase. There is no evidence on the record that Respondent had granted such large "Market Adjustment" increases in years past, and certainly not on any regular basis. This raise, according to the testimony of Cory Garner, President of Respondent's West Region, was the result of Respondent wanting to maintain a competitive edge by offering its employees within the region wages that were similar to those offered in the area. It was a discretionary decision on his part to grant this "market adjustment" raise to the employees in the region.[9] The second raise, deemed a "Periodic Salary Adjustment" came on October 1, and ranged from 42 to 77 cents per hour (Jt. Exh. 7(b))

[6] This limitation is likely the result of the time period covered by the General Counsel's subpoena.

[7] Indeed, Hernandez' testimony in this regard is consistent with his later testimony, as discussed below, that in July 2018 he asked then Operation Manager Garcia when he could expect his promised wage raise. Hernandez' testimony also dovetails with Vice President Scott McFarland's testimony that he would typically give larger raises to newer employees in order to reduce the wage gap between newer employees and more senior ones, as discussed below.

[8] I take judicial notice of the fact that 2009 was at the height of the so-called "Great Recession," when the economy had tanked, to put it mildly. McFarland also testified that prior to 2016, the year that Respondent was acquired by Air Liquide, Respondent gave its raises during April, at the beginning of its fiscal year, but since then has given its raises in October, which dovetails with Air Liquide's fiscal year. This would appear to explain Huerta's recollection of raises given at different times of the year. I would further note that in 2019 Respondent again changed its "*Annual* Salary Increases" to April (see, Jt. Exh. 10. Emphasis added).

[9] There is no evidence that this "market adjustment" raise, unlike the yearly pay raises decided by the corporate leadership, was offered to employees outside the west region. As noted above, this raise is not the subject of the allegations in the complaint.

or about a 2 to 3-percent increase, which was entirely consistent with the yearly raises that Respondent had granted its employees across the board since at least 2013.

The evidence shows the following regarding how these wage raises came about, and why the drivers were excluded from getting these raises in 2018. Regarding the manner by which Respondent decides to give the yearly wage raises, and the amount of such raises, the evidence is fairly uncontroverted, for the most part. Thus, Cory Garner, president of Respondent's west region, testified that Respondent's senior (national) corporate leadership makes an annual decision as to whether merit wage increases are forthcoming, and provides guidance as to the "target" amount, in essence setting a cap or range for said increases.[10] It is then left to the assistant vice presidents within the Regions to determine the precise amount the employees within each Region would receive, within the guidelines set by the corporate leadership. As mentioned above, from 1997 through 2017 McFarland was responsible for determining the exact raise each employee within the Region would receive, within the parameters established by Garner, who in turn had to stay within the targets established by the corporate leadership. McFarland testified that he used a formula that sought to bridge the wage differentials between less senior and more senior employees, by typically granting less senior employees a higher raise, but that also took individual performance into account, including avoidable accidents. As shown by the statistical data provided by the Joint Exhibits discussed above, the amount of these raises was consistent throughout the 5-year period from 2013 to 2018, typically between 2 to 4 percent. As for the reason for excluding the drivers from this raise in 2018, this issue will be discussed below.

The "Market Adjustment" raise granted on September 3, as discussed briefly above, appears to be a different animal, a one-time raise designed to keep wages in par with those in the area, and one that was decided upon by Garner on a Regional basis, without apparent national corporate input. Garner testified that he based his decision regarding 2018 "Market Adjustment" raise based on analysis produced by Chris Kaul from Respondent's HR department, and presented to Garner the day *before* the Union filed its August 27 petition seeking to represent the drivers in Burbank. Garner initially admitted that Kaul's analysis of the recommended wage increases included both the drivers as well as the production employees. On August 28, the day after the petition was filed, however, Respondent announced that only the production employees—not the drivers—would be receiving a wage raise. Garner testified that it was his decision to grant only the production employees a wage raise, because the Union had filed a petition to represent the drivers and that "laboratory conditions" in the wake of such petition had to be maintained.[11]

[10] These caps or guideless generally called for average increases of approximately 2.5 to 3%.

[11] It is undisputed that the Union filed its petition on August 27 (J Exh. 2(a)). Initially, Garner testified that he had received the wage analysis from Kaul the day before the petition was filed, and that the drivers were included in that analysis (Tr. 547), only to contradict himself at a later point, claiming that the drivers had not been included (Tr. 640–641). A discussion on the record by counsel regarding a subpoena that arguably encompassed Kaul's analysis, and prompted additional testimony from Garner, however, established that Kaul sent his wage analysis to Garner on August 20, a week before the petition was filed, and included an analysis covering both production workers as well as drivers, and which encompassed the entire Region, not just Burbank (Tr. 625–650). Although this raise is not at issue pursuant to the complaint, Garner's contradictory testimony in this regard did not help his credibility, as he left the impression that he was seeking to avoid admitting facts that he believed might be detrimental to Respondent's case.

Sometime in September, the national corporate leadership decided to grant a nation-wide wage increase, as it had done since at least 2013, and decided to cap such increase at 3 percent, which was also generally consistent with previous caps. Respondent announced this wage increase via memo to all its employees on September 20, 2018 (Jt. Exh. 8).[12] As was its practice in years past, Respondent left it to its regional management to determine the exact raise each individual employee would receive, within the limits of the cap set by the corporate leadership. As described earlier, from 1997 through 2017 the job of determining these individual raises had been performed by assistant VP McFarland. In 2018, however, Garner decided that he, not McFarland or another vice president (such as J R Brees, North LA area vice president) would determine the amounts of the raises that were given to individual employees in the Region, including the facility in Burbank, although he did not provide an adequate explanation as to why there was such a departure from past practice.[13]

On October 1, 2018, Respondent granted its annual wage increase to its employees, but in the case of the Burbank facility, only to its production employees—not to its drivers, as in years past. Garner testified that the October raise, which occurred after the Union had won the election (but before it the Union was certified), was granted only to production employees because there had been a "change in the methodology" of calculating this raise, which represented a "change in the status quo" that had to be "collectively bargained" about (Tr. 536). It is notable that Respondent admitted that it never notified the Union about its decision to grant these wage raises, or its decision to withhold these wage increases from the drivers, let alone about its rationale for doing so.[14]

Based on the above, the facts strongly support the conclusion that *but for* the filing of the petition or their support for the Union, the drivers would have received the same raises granted to the production employees, as they had regularly received in years past. Contemporaneous statements made by supervisors of Respondent to the drivers lend further support for this conclusion. Thus, driver Manuel Hernandez testified that sometime in July (2018) he asked (operations manager) Sulma Garcia when he could expect his raise.[15] Garcia told him she would check with management, and a few days later informed him that the raise would come in October. In August, shortly after the petition was filed, Garcia told Hernandez that he had been "this close," to getting a raise, but would get nothing now because he, or his fellow drivers,

[12] September 20, 2018, was also the date the Board held an election at the facility, in which the drivers chose to be represented by the Union. The decision to grant that raise, however, had already been made. The Union was certified on October 11, 2018.

[13] Garner testified that McFarland's "methodology" of determining wage raises "did not make sense" to him, so he decided to use his own methodology in 2018. Garner's explanation as to what "methodology" he used to determine wage adjustments in 2018 was at best muddled, however, offering only that it was based on a "market adjustment (analysis)," as well as performance reviews, although he did not adequately explain how such performance reviews differed from McFarland's. Indeed, he admitted that undertook a "quick" review of McFarland's analysis, and never reviewed its "details" nor the individual adjustments, and only made sure it remained within the guidelines or caps (Tr. 566–567; 569). It is thus inexplicable how Garner's methodology significantly differed from McFarland's, inasmuch he admitted not being familiar with the latter's method.

[14] According to the testimony of Respondent's vice president and counsel Michael Murphy, Respondent did not notify the Union after September 20 because it not yet been certified (Tr. 405.)

[15] Hernandez testified that when he was hired in 2017 then Operations Manager Laureano Castillo told him he would get a $1-raise after 1 year, another $1 after the second year, as well as cost of living raises (Tr. 186–187).

supported the Union.[16] Similar statements were made during a series of mandatory meetings Respondent started holding with drivers soon after the petition was filed, to discuss the Union. These meetings occurred at least 2 to 3 times per week during the pre-election period, and were conducted by District Manager Ron Rydzewski, Area Vice President JR Brees, and Area Branch Operations Manager Gerardo Ruiz. According to the testimony of driver Elio Carrillo, both Rydzewski and Brees stated during one of the meetings that if the Union was voted in, they couldn't "help you with raises." They also reminded the drivers that "October is coming," a reference to the time when Respondent traditionally gave wage raises. According to driver Hernandez, these managers stated during the meetings that because of the Union "everything was frozen." Driver Victor Mendoza similarly testified that during these meetings, these managers said that because of the Union, there was a "freeze" and that there would be no raises coming.[17]

Additionally, the evidence shows that for several weeks during the period immediately following the filing of the petition, managers accompanied drivers during their daily routes (commonly referred to as "ride-alongs"), during which they spoke about the Union and made comments similar to the ones described above. Thus, Carrillo testified that he was accompanied by Ruiz during one of these "ride-alongs," during which Ruiz would ask him how he felt about the Union—something Carrillo tried to avoid answering. Ruiz also told Carrillo that the Company was listening to the drivers and was willing to "work with them," provided they did not support the Union, and then repeated the refrain "October is coming." Hernandez testified that Rydzewski accompanied him on his route during one of these ride-alongs, and that Rydzewski asked him about his motivation for supporting the Union—something Hernandez tried to avoid answering, saying he was undecided. Rydzewski told Hernandez that the production employees (loaders and fillers) had just received a raise which they were happy about, but that the drivers' wages were frozen—something that could change if they voted against the Union.[18]

Finally, additional comments were made by managers in other contexts that alluded to what might occur depending on whether the Union was voted in or not. Carrillo thus testified that in the week prior to the election, Ruiz spoke to him near the dock, and said that he had just checked in his office and said, "you are looking at about a four-buck raise." Shortly afterwards, Rydzewski came by the dock, shook Carrillo's hand and said that he wanted to apologize in

[16] I credit Hernandez' testimony, noting that he is a current employee, which enhances his credibility, and the fact that neither Castillo nor Garcia testified.

[17] I credit the testimony of Carrillo, Hernandez and Mendoza, not only because their status as current employees enhance their credibility, but also because Respondent did not proffer any testimony that contradicted or refuted their testimony. In that regard I note that while Brees testified that he was not a "presenter" during these meetings and that *he* did not even speak or said anything about the Union (Tr. 472; 484; 496–497), he never denied that Rydzewski, who did not testify, did so. Accordingly, I find that the statements were made as described by these employees. I would further note, as will be discussed further below, that although Garner testified that he decided that the raises in question could not be granted because "laboratory conditions" needed to be preserved, no such nuanced or legally elegant terminology was used when drivers were told by managers why they weren't getting raises.

[18] Again, I credit the testimony of Carrillo and Hernandez, noting that neither Ruiz nor Rydzewski testified. I would additionally note that Respondent proffered the testimony of Brees to explain that there were legitimate business reasons for these ride-alongs, inasmuch there had been some customer complaints about the way some of the product deliveries were being made or handled. Be that as it may, it is clear that Respondent used this opportunity to speak to the drivers about the Union—which was the reason they had not received a wage raise given to others.

advance. When Carrillo asked why, Rydzewski said, "if you guys vote the Union in tomorrow, it's going to get ugly."

C. The Changes in Working Conditions

The complaint alleges that in early 2020 Respondent changed the working conditions of the drivers, more specifically the starting and ending times of their shifts, the number of working days per week (from 5 days a week to 4), their total amount of working hours, and the elimination of overtime work. Additionally, the complaint alleges that Respondent laid off driver Cameron Desborough in April 2020, and that Respondent made all these changes without bargaining with the Union.[19] At the outset, I note that there is no factual dispute that these changes took place. Indeed, as more thoroughly discussed below, there is really no dispute that little or no bargaining took place between Respondent and the Union regarding these changes, and Respondent instead takes the position that exigent circumstances related to the COVID-19 pandemic justified its conduct.[20]

Thus, drivers Joe Ledesma, Victor Mendoza, and Victor Rodriguez testified that prior to March 2020 their shifts started at 5:30 a.m. and ended at 2 p.m., and driver Elio Carrillo testified that his shift started at 6:30 a.m. and ended at 3 p.m. All of these drivers also testified, without contradiction, that starting on or about March 23, 2020, their schedules were changed to start, and end, 1 hour earlier.[21] Ledesma, Mendoza, and Rodriguez testified that they were notified of these changes during a preshift morning meeting by Operations Manager (OM) Daniel Rodriguez, who did not mention the COVID-19 pandemic as the reason for the change. There is no evidence that Respondent ever notified or bargained with the Union about these shift changes prior to their implementation.

With regard to the alleged reduction in the number of work hours per week, drivers Ledesma and Hernandez testified that for a number of years (or at least since 2017), drivers had regularly worked 8 hours a day, 5 days per week, excluding overtime. In mid-March 2020, OM Rodriguez announced during a safety meeting that drivers' schedules would be reduced to working 4 days per week, to 32 hours. This reduction in the amount of work hours was later confirmed in a letter sent to the drivers on April 6, 2020 (Jt. Exh. 25(a)-(l) and is reflected in the payroll records (J. Exh. 27(a)-(m)). In order to mitigate for the reduction in hours (and resulting reduction in pay), Respondent allowed the drivers to use earned vacation or floating days off to cover for the missing day each week. Curiously, although Respondent notified the Union by letter on April 2, 2020, that these measures were being implemented in its Alameda facility (also

[19] Complaint par. 8(a) through (g).

[20] In this regard I would note that while Respondent generally denied these allegations in its answer to the complaint, except the layoff of Desborough which it admits, uncontradicted evidence shows that these changes took placed as alleged. Moreover, in its post-hearing brief, Respondent concedes as much, and instead focuses on the argument that exigent circumstances legally justified its conduct, as will be discussed in more detail below.

[21] These schedule changes are also confirmed by payroll records admitted as Joint Exhibits (Jt. Exhs.) 27 (c), (j), (k), and (m).

known as the "Lynwood" facility), no such notice was given to the Union regarding the Burbank facility, the site of the instant dispute (Jt. Exh. 13).[22]

Regarding overtime, drivers Ledesma, Desborough, Mendoza and (Gilbert) Huerta testified that prior to 2020 they generally averaged several hours of overtime per week. The procedure, in general, was that if they had not made all their deliveries by the end of their normal shift, they would keep going until all such deliveries were completed, before returning to the yard. In mid-March 2020, they testified, OM Rodriguez informed drivers that a new overtime (OT) procedure was being implemented. This new procedure required drivers to call the dispatcher 6 hours into their shift to report how many deliveries remained to be made on that day. The dispatcher would then inform the drivers how many more deliveries they could make, and whether the driver was permitted to work OT to complete their deliveries. The end result, beginning in mid-March 2020, was that drivers were routinely denied OT and were instructed instead to return to the yard at the end of their shifts, even if all deliveries had not been completed. Records admitted as Joint Exhibits 27 (a)-(m) show that from 2017 through early 2020, drivers typically worked several hours of OT per week, and hundreds of hours per year. Beginning in mid-March, the number of OT hours worked by drivers sharply declined, almost stopping altogether, at least until the very end of the year.[23] Union Business Agent Tom Tullius testified that Respondent did not notify the Union about these changes in its OT policy until sometime in mid-April 2020, by which time the changes had already been implemented.[24]

Regarding the topic of communications or negotiations between Respondent and the Union regarding the changes in drivers' schedules and OT pay, the record shows scant evidence of any significant such communications, let alone negotiations. Thus, on March 20, 2020, Union Representative Tullius wrote Respondent an email requesting that certain safety procedures and protocols be implemented in light of then current events, implying (although not mentioning) the newly resurgent COVID-19 pandemic, and that a $2-per-hour "hazardous pay" bonus be paid. (Jt. Exh. 11.) Respondent did not immediately respond to Tullius' March 20 letter, and he again wrote on April 2, this time inquiring about possible layoffs in Alameda and Burbank and requesting certain information about this. Respondent replied on the same date, denying that any such layoffs were planned at this time. By separate email the same date, Respondent informed Tullius of a number of measures it had implemented already in light of the "national unforeseen emergency" related to COVID-19 pandemic, which necessitated immediate actions without prior notice to the Union.[25] The email (letter) goes on state that in light of decreasing business, schedule changes were being implemented in *Alameda*—it said nothing of Burbank. The letter further informed Tullius that it was declining his proposal for a $2-per-hour hazard pay. The letter did <u>not</u> mention either the schedule changes in or OT pay changes in Burbank (Jt. Exhs.

[22] Thus, although the first page of Respondent's April 2 letter addresses measures being implemented at both the Alameda and Burbank facilities in response to COVID-19 pandemic, the second page, which addresses the reduction in hours, only references the Alameda facility.

[23] Jt. Exh 27 (a)-(m) shows the beginning and end of each driver's shifts, and the total number of hours worked (under the adjacent "Shift" and "Daily" columns) on a daily basis during the years 2017 to 2020, with a summation of totals for each driver, including OT, at the end of each calendar year.

[24] No testimony or other evidence was proffered by Respondent to the contrary.

[25] These unilateral actions consisted primarily of relatively minor safety-related protocols and are not at issue in this case.

12; 13).[26] By letter dated April 5, Respondent sent Tullius a list of Alameda and Burbank employees that he had requested and informed him that no layoffs were planned at either facility at the time—although scheduled changes had been implemented I Alameda, as previously noted. (Jt. Exh 14).

D. The Layoff of Desborough and Communications between the Parties about it

Respondent laid off Burbank driver Cameron Desborough on or about April 29, 2020, a fact which is not is dispute. What is disputed is whether Respondent gave prior notice and afforded the Union an opportunity to bargain about his layoff. The record shows as follows with regard to the communications/negotiations between the parties regarding Desborough's layoff.

On April 24, 2020, Respondent informed the Union (Tullius) by letter, that because of declining business volumes additional "mitigation" measures would have to be undertaken at the Burbank and Alameda facilities, including the layoff of three (3) drivers in Alameda and one (1) in Burbank, which would be done on the basis of "inverse order of seniority," on April 29, 2020. Accordingly, it notified the Union that Desborough, the last driver hired in Burbank (on 4/1/19), would be the Burbank driver to be laid off. It further advised the Union that should business volumes improved, these laid-off employees would be recalled to work according to seniority, provided it occurred within 12 months of their layoff. The letter also advised the Union that employees not represented by the Union were subject to a reduction-in-force ("RIF"), and were being separated from the Company, as opposed to being laid off with recall rights, and were thus being offered a severance package. It asked the Union to notify Respondent immediately if its members would instead be interested in such severance package, which would not include recall rights. Finally, the letter concludes as follows:

> ". . . although unexpected economic exigencies continue to compel rapid implementation of these mitigation measures, please take notice that Airgas remains willing to bargain over this matter, should the Union request it, regardless of the implementation date. Please contact me immediately if you wish to discuss." (Jt. Exh. 1.)

Later that same day, Tullius responded. He asked when the four drivers (3 in Alameda, 1 in Burbank) would be notified of their layoff, and requested a copy of the severance agreement being offered to the employees subject to the RIF, so he could advise the Union drivers being laid off (whether that may be a better option for them). He proposed that Respondent allow the laid-off drivers to keep their health benefits for 2 months following their layoff. (Jt. Exh. 17). Respondent did not respond immediately, so 3 days later, on April 27, 2020, Tullius again requested a copy of the severance agreement (being offered to RIF employees). (Jt. Exh. 18). The next day, on April 28, Respondent provided the information requested by Tullius on April 24, including a copy of the severance agreement, and responded that it was considering Tullius'

[26] Indeed, I would note that in its post hearing brief, Respondent admits that the schedule changes in Burbank were not related to COVID-19 pandemic but were rather part of a long-held practice of altering drivers' schedules pursuant to its business needs.

proposal regarding the continuation of health benefits, and addressed other issues he had raised.[27] On April 29, Respondent's counsel (David Gonzalez) phoned Tullius to further clarify Respondent's positions, informing him that it would not be extending health benefits for laid-off drivers, or offering hazard pay, and explaining that the union drivers being laid off had the option of accepting the severance package being offered to RIF'd employees, but would give up recall rights if they took that option.

Desborough chose to be laid off with recall rights, and as described before, he was laid off on April 29, 2020. Respondent offered to recall him to work 4 or 5 months later to the Alameda facility, an offer that Desborough declined because the Alameda facility was farther away from his home than Burbank, a much longer commute, and he was already working for another employer.

IV. ANALYSIS

A. The Allegation Regarding the October Wage Raise

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by failing to grant its (bargaining unit) drivers a wage increase on October 1, 2018, that it granted its production (non-bargaining unit) employees.[28] The General Counsel argues that this wage increase, which Respondent had granted across-the-board to all its (nonmanagerial) employees for several years, was an established past practice. As such, the General Counsel argues, Respondent would have routinely granted its drivers this raise, but for the fact that they chose to be represented by the Union, and that this represents unlawful discrimination. General Counsel further argues that under the *Wright Line*[29] analytical framework, it has established that the Respondent acted unlawfully. The Charging Party Union joins the General Counsel in this assertion, but also points out that Respondent's conduct in this regard was "inherently destructive" of Section 7 rights, and as such it was unlawful regardless of Respondent's motivation, obviating the need for a *Wright Line* analysis. Respondent, on the other hand, argues, first, that there was no established past practice with regard to the wage raises; second, that it acted lawfully because it could not grant a wage raise during the pendency of an election without violating the Board's "laboratory conditions" requirement; and finally, that after the drivers chose to be represented by the Union during the September 20, 2018 election, any raises to such drivers could not be granted because it was subject to collective bargaining—which the Union did not request. For the reasons discussed below, I find that the General Counsel and the Charging Party Union have the better argument, and that Respondent acted unlawfully when it failed or refused to grant the drivers the raise it granted other employees on October 1, 2018.

In determining whether a wage increase is an established (past) practice, the Board looks at a number of factors, including the number of years the program (raises) has been in place, the

[27] Tullius had also asked if Respondent would oppose the laid-off drivers filing for unemployment benefits (they would not), and had again proposed a $2 per hour "hazardous pay" supplement (Respondent would not). Respondent did not agree to a continuation of health benefits for the laid-off employees.

[28] Complaint pars. 7(a) and 9.

[29] *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), *approved* in *NLRB v. Transportation. Management Corp.* 462 U.S 393, 399–403 (1983).

regularity with which the raises are granted, whether the employer used fixed criteria to determine whether employees would get raises, and the timing of the raises. *Omni Hotels Management Corp.*, 371 NLRB No. 53, slip op. at 3 (2022), citing *Rural Metro Medical Services*, 327 NLRB 49, 51 (1998). Other factors to consider include whether the employer has promised wage increases and whether employees would reasonably come to expect such wage increases during certain times. *All American Gourmet*, 292 NLRB 1111, 1134 (1989); *Omni Hotels*, supra., slip op. at 4; *Advanced Life Systems, Inc.*, 364 NLRB 1711, 1712 (2016), enf. denied 898 F.3d 38 (D.C. Cir. 2018).

All of these factors are present here—and more. Thus, as described in the facts section, documentary evidence firmly establishes that Respondent had, since 2014, granted raises every year for the 4 years preceding 2018, with 2018 being the fifth year in a row that said raises were granted, albeit excluding the drivers on that year. Indeed, testimonial and circumstantial evidence strongly indicates that in fact Respondent had granted those yearly raises even prior to 2014, granting them every year since at least 2004, with the possible exception of 2009—the year of the "Great Recession." While the timing of these raises may have varied over the years, depending on whether the corporate fiscal year ended in April or October, there can be no question that these raises had become a fixture that employees could reasonably count on from year to year. The process by which these raises were decided also followed a predictable pattern: the corporate leadership decided each year whether a raise was forthcoming, nation-wide, and set a "cap" or maximum allowable (typically around 3%).[30] It was then left to regional management to decide the particulars as to how much individual employees were to receive, with seniority and performance being the main—if not the only—factors considered, according to the evidence.[31] Thus, from 1997 through 2017 west region VP McFarland was in charge of deciding the exact amount, within the corporate cap, each individual employee would receive, always using the same criteria, namely seniority and to a lesser degree performance, which he equated to accident avoidance. As discussed above, in 2018, west region President Garner took over this function, for reasons that aren't completely clear, which was an unusual, if not unprecedented, move.[32] Moreover, employees were reasonably led to believe that raises were to be expected on a yearly basis, based on statements made to them during hiring interviews as well as other statements made to them in the wake of the Union campaign, with managers taunting drivers with the prospect of raises that they would lose if they chose to be represented by the Union (i.e., "October is coming"). Indeed, I note that even the term used by Respondent in describing the raise(s), such as "*Annual* Salary Increases" (Jt. Exhs. 9;10, emphasis supplied), suggest a recurrent, expected event.[33]

[30] Little evidence was introduced as to what factors were considered by corporate management in determining whether a raise would be granted, but given that 2009 was apparently the only year in which such raise was not granted since at least 2004, it is reasonable to infer that over-all corporate profitability was likely the main factor.
[31] Regional management hence had no say or discretion as to whether a raise was granted any given year, or about its scope; it was a directive from above. Their only discretion was about specific the amounts given to individual employees.
[32] The explanation by Garner of the criteria he used to determine individual raises, as discussed earlier, and further discussed below, left much to be desired, and could not readily be differentiated from the one used by McFarland.
[33] Thus, in March 2019 Respondent advised its employees in a memo that "Starting this year in 2019, Airgas is adjusting the timing of our *annual* salary increases; they will now take effect in April *each year* instead of October" (emphasis supplied).

Accordingly, I conclude that by 2018, the year of the events at issue herein, Respondent had an established practice of granting annual across-the-board wage raises to its nonmanagerial employees; such yearly raises thus represented the *status quo*. Having concluded that these yearly raises were the established practice, I now turn to the issue of whether denying the drivers the raise granted to other employees on October 1, 2018, was unlawful. I conclude that it was. In *Advanced Life Systems, Inc.*, supra, the Board found that the employer violated Section 8(a)(3) and (1) of the Act by denying employees a planned wage raise that it would have otherwise granted them but for the fact that they had engaged in union activity—the exact situation that is present in this case. The Court of Appeals for the District of Columbia refused enforcement, primarily on the basis that the wage raises in question were not an established practice by the employer because such raises had been irregular—only two such raises within the past 5 years. In so doing, however, the court made this important observation:

> [i]f the employer has a "longstanding practice" of awarding the same "automatic increases" or bonuses, *Katz*, 369 U.S. at 746, 82 SC 1107, at "fixed" and "regular intervals," *Acme Die Casting v. NLRB*, 93 F.3d 854, 856–857 (D.C. Cir. 1996), the continuation of those payments is permitted. More than that, the failure to continue making the payments could be construed as evidence of discrimination against the employees' exercise of their unionization right, which is itself an unfair labor practice under Section 8(a)(3), 29 U.S.C. § 158(a)(3). See *Katz*, 369 U.S. at 746, 82 S.Ct.1107.

Advanced Life Systems Inc. v. NLRB, 898 F.3d 38, 46 (D.C. Cir. 2018). As discussed above, unlike in the case before the court, the employer in this case had granted such increases every year for 5 years, and likely much longer, and as such was an established practice. As noted by the court, the discontinuation of such practice in response to its employees' union activity can be seen as evidence of discrimination in violation of Section 8(a)(3) of the Act. I conclude, moreover, than in this case such conduct can not only be deemed as evidence of discriminatory intent, but more than that, it is conduct that is "inherently destructive" of employee rights under Section 7, pursuant to the doctrine first announced by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). As such, the employer's conduct can be proscribed without need for proof of an underlying improper motive. *United Aircraft Corp.*, 199 NLRB 658, 662 (1972).[34] Accordingly, I believe that a *Wright Line* analysis is unnecessary in these circumstances, although as discussed below, I find the General Counsel has met its burden under that analytical framework as well.

Moreover, a long line of Board cases, although not directly relying on the "inherently destructive" doctrine, have likewise established that an employer violates the Act when it withholds wage raises that would have otherwise been granted but for its employees' union activities. Thus, in *Modesto Convalescent Hospital*, 239 NLRB 1059, 1067 (1978), the Board

[34] I believe this case fits squarely within the mold of *United Aircraft* and covered by the *Great Dane* doctrine that appears to have become dormant, for reasons that are not apparent. In that regard, I can't conceive of conduct that could be more inherently destructive of Sec. 7 rights than denying an entire group of employees a wage raise, on account of their union activity, that everyone else received, except for perhaps the shutting down of an entire plant, acts of violence, or threats thereof. I find that in this case Respondent's taunting of the drivers, by reminding them that but for their union activity they would have received the wage raise granted to other employees, represented a "twisting of the knife" that imparted coercive flavor to the "inherently destructive" conduct.

stated, "[w]henever the employer, by promises or conduct, has made a particular benefit part of an established system, then he is not at liberty to deviate from the system during the union campaign." Likewise, in *Cutter Laboratories, Inc.*, 221 NLRB 161, 168 (1975), the Board observed "[I]t is well settled that an employer's legal duty during the pendency of a representation petition is to proceed as he would have done had the union not been on the scene" (internal citations omitted). Further, the Board has made clear "that withholding employees' wage increases because of their union activities, which otherwise would have been granted, and so advising them, is a violation of the Act." *Baker Industries, Inc.*, 224 NLRB 1111, 1113 (1976).

This is precisely what Respondent has done here. Given that these wage raises were an established practice, Respondent cannot take refuge in the *laboratory conditions* defense in these circumstances.[35] Such defense would have been valid had Respondent announced to its employees that it was temporarily withholding the yearly wage increase so as to not improperly influence the outcome of the election but given assurances that the wage increase would be granted after the election, regardless of its outcome. See, e.g., *Cutter Laboratories*, supra., citing *Standard Coil Products*, 99 NLRB 899 (1952); and *Uarco, Inc.*, 169 NLRB 1153 (1968). Respondent did not do this, but rather announced that a wage freeze, applicable only to its drivers, was in place because of the petition, and made statements suggesting that the drivers would lose out on receiving the wage increase if they chose to be represented by the Union. Moreover, the "critical period" during which "laboratory conditions" should be maintained officially ends on the day of the election. *Ideal Electric*, supra. Respondent announced the (nation-wide) wage raise on September 20, the day of the election, but the raise did not go into effect until October 1, well after the critical period was over. Thus, this defense is unavailable to Respondent in these circumstances, and bears the appearance of a pretext in that regard.

Perhaps suspecting the weakness of such defense, Respondent proffered a second, and even less plausible, defense for its failure to grant the October 1 raise to its drivers. Thus, according to the testimony of west region President Garner, in 2018 he decided to use a different formula than had previously been used by VP McFarland for many years to determine the precise raise each individual employee would receive. According to Garner, this new formulation represented "a change in the status quo that needed to be collectively bargained" with the Union.[36] There are two basic and fundamental problems with this defense, however, which renders it meritless. First, by admitting that the wage raises in question represented the "status quo," Garner unwittingly affirms and advances the General Counsel's and Charging Party's argument that these raises were the established (past) practice, triggering Respondent's obligation to grant the wage raises to the drivers pursuant to the doctrine discussed in the cases cited above, regardless of the petition or election outcome. Secondly, Garner's unpersuasive testimony failed to establish how his new formulation varied in any significant way from the manner in which McFarland had decided to parcel out the raises in the past—a process which Garner admitted he did not review, let alone understand. Thus, Garner's 2018 formulation was at most a distinction without a difference, having changed little, if anything, of the "status quo." In that regard, it is notable that Garner had no say on the two most important factors in

[35] The "laboratory conditions" doctrine normally applies during the critical period from the date a petition is filed through the date of the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961)
[36] Tr. 536.

determining whether the raises were consistent with established past practice: whether raises would be given at all, or the target amount ("cap") of the raise, both of which were decided by the national corporate leadership. Indeed, the raises received on October 1, 2018, by the production employees did not differ in any significant way from the raises that all the employees, including the drivers, had received during the 4-year period from 2014 to 2017, which remained consistent with past practice. In these circumstances, it is apparent that Garner's defense that Respondent could not grant the drivers the October 1 raise without first bargaining with the Union is a pretext, likely an after-thought for its discriminatory policy. This is particularly true given that Respondent never notified the Union that it had granted the wage raise to other employees, nor explained to the drivers that "laboratory conditions" or its obligation to bargain prevented them from giving the otherwise automatic wage raise. Rather, Respondent sought to blame the Union, informing drivers that everything was "frozen" because of the Union, or teasing that they had come "this close" to getting a raise, or taunting them with the phrase 'October is coming." See, e.g., *KAG-W, LLC*, 362 NLRB 981 (2015). In these circumstances Respondent's obligation was not to refrain from granting the drivers their due raise in light of the Union's new status as their bargaining representative, but rather notifying the Union that it would, consistent with past practice, grant the drivers the raise—and inquire if the Union had any objection. It is inconceivable that the Union would have so objected.

As discussed above, I do not believe that a *Wright Line* analysis is required in these circumstances, given my conclusion that Respondent's conduct was inherently destructive of Section 7 rights and unlawful motivation need not be established.[37] Nonetheless, should the Board disagree and conclude that this conduct does not fit the *Great Dane Trailers* and *United Aircraft* mold, I conclude that the General Counsel has met its *Wright Line* burden in these circumstances. I would also find that Respondent did not correspondingly meet its burden to show that it would have acted in the same manner in the absence of protected activity. In that regard, I would observe that protected activity and knowledge of that activity are both undeniable—the Union filed a petition on August 27, which Respondent admitted receiving on the same date. There is ample evidence of animus that can be imputed from the various statements made by management representatives blaming the Union for the drivers' failure to get a raise, or warning that selecting the Union s their representative would cost them the raise or have other adverse consequences. Finally, there was an adverse consequence in that the drivers did not get the raise that they had repeatedly received in prior years. The burden then shifts to Respondent to show that this adverse consequence would have occurred even in the absence of union activity. This defense is plainly unavailable to Respondent, for the reasons discussed above, since it admitted that the *only* reason it did not grant the drivers a raise was because the Union was in the picture, that is, the purported need to maintain "laboratory conditions," and then the duty to bargain once the Union was selected as the drivers' representative.

[37] Where all the acts have been fully litigated, such as in this case, I am permitted to find a violation on a different theory than explicitly plead or advanced by the General Counsel. *Hawaiian Dredging Construction Co.*, 362 NLRB 81 fn. 6 (2015), and cases cited therein; *Noel Canning*, 364 NLRB 503, 507 (2016).

Accordingly, for the above reasons, I find that Respondent violated Section 8(a)(3) and (1) of the Act by denying the drivers the 2018 raise that by then had become an established practice.[38]

B. The Change in the Working Conditions

It is undisputed, as set forth in the facts section, that in March 2020 Respondent changed the starting time and ending time of the shifts for its drivers, and that in April 2020 it shortened the number of days and hours that the drivers worked, from 5 days/40 hours per week, to 4 days/32 hours per week. Respondent also started reducing overtime hours significantly, although this change may have occurred earlier, perhaps as early as February. It is also undisputed that at no time Respondent notified the Union of these changes, nor bargained with the Union about them.

It is well settled that an employer must notify and bargain with the collective-bargaining representative of its employees prior to making any unilateral changes in mandatory subjects of bargaining, such as the wages, hours and working conditions of the represented employees. Any unilateral change in such mandatory subjects of bargaining constitutes a *per se* violation of Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962). Moreover, when the employer and union are in the process of negotiating their first collective-bargaining agreement, such as in the present case, the employer must refrain from making any unilateral changes until an overall impasse has occurred in the contract negotiations—which discourages piecemeal bargaining and protects the integrity of contract negotiations. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). There can be no question that changes to working schedules are a mandatory subject of bargaining, *Pepsi Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 904 (2000), citing *Our Lady of Lourdes Health Center*, 303 NLRB 337, 339 (1992), and that even minute changes in such schedules trigger an obligation to bargain, *Hedison Mfg. Co.*, 260 NLRB 590, 592–594 (1982), (involving a 5-minute change in the starting time).

In its post hearing brief, Respondent argues that the economic decline and loss of business in the wake of the COVID-19 pandemic justified the changes in scheduling and failure to notify and bargain with the Union in March and April 2020 about these changes. I disagree. It is well established that only truly exigent circumstances, such as an emergency, may temporarily excuse the obligation to bargain. As the Board stated in *Seaport Printing & AD Specialties, Inc.*, 351 NLRB 1269–1270 (2007), enfd. 589 F.3d 812 (5th Cir. 2009), "The Board has consistently maintained a narrow view of the economic exigency exception. It has limited 'economic exigencies' to 'extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action' (citations omitted). In that regard, 'absent a dire economic emergency, . . . economic events such as the loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." (footnotes omitted.) Thus, while there can be no question that

[38] The Charging Party Union urges me to additionally find that Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to negotiate with the Union the denial of the drivers' wage raises. Unlike finding a violation on a slightly different theory than advanced by the General Counsel (see note 37 above), however, the General Counsel controls the allegations of the complaint, and I do not have the authority to add allegations not already in the complaint. See, e.g., *GPS Terminal Services*, 333 NLRB 968, 968–969 (2001); *Hobby Lobby Stores*, 363 NLRB 1965 fn. 2 (2016).

because of COVID-19 pandemic Respondent's operations started experiencing declining business in March 2020, such decline does not justify or excuse Respondent's unilateral action.[39] Respondent also argues that the changes were "minor violations of the Act" and short lived, and that the losses incurred by the drivers were minor.[40] Again, I disagree. First, a work reduction from 5 days per week (40 hours) to 4 days a week (32 hours) represents a 20-percent reduction in work and wages—which is significant, even if short-lived. Additionally, starting and finishing shifts earlier can significantly impact workers lives. Moreover, there was a significant reduction in overtime hours, and correspondingly of overtime pay. Simply put, to brand these changes as "minor" abuses the word "minor." I would also observe that the sin here not only lies in the financial or lifestyle impact that these unilateral changes had on the members of the bargaining unit, which is significant, but just as importantly on the impact this conduct could have on the image of the Union in the eyes of the employees it represents. Such unilateral actions by Respondent cannot but have the effect of signaling to employees that the Union is impotent and powerless to protect them, conveying the message that their selection of the Union as their representative was a futile act. This is particularly true where, as in here, the Union was newly certified and was still in the process of negotiating its first contract. See, *NLRB v. Advertisers Mfg. Co*, 823 F.3d 1086, 1090 (7th Cir. 1987).

Accordingly, and for these reasons, I find Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify the Union, or giving it an opportunity to bargain, regarding the reduction of overtime for drivers, the change in drivers' schedules, and the reduction of work hours for the drivers.

C. The Layoff of Desborough

As described earlier, on April 24, 2020, Respondent notified the Union that because of a reduction in business, it would have to lay off Cameron Desborough, who was the least senior driver, on April 29, 5 days later. Unlike the unilateral changes discussed above, where no notice or opportunity to bargain was proffered to the Union, Respondent did notify the Union of Desborough's layoff, albeit with only 5 days' warning. During those 5 days, an understandably very limited amount of bargaining took place via letters and/or emails, and ultimately Respondent and the Union agreed that Desborough would be offered a choice of being laid off with recall rights or accepting a severance package that would terminate his status as an employee. Desborough chose the former, although he later declined reinstatement to a different facility.

It is well established that employers must notify and bargain with the collective-bargaining representatives of their employees prior to making a decision to lay off employees. In other words, employers must bargain about the decision itself, not just its effects. *NLRB V. Katz*, supra; *Bottom Line Enterprises*, supra; *Farina Corp.*, 310 NLRB 318, 321 (1993). In this case, Respondent notified the Union only 5 days before the layoff, which was by then a *fait accompli*,

[39] Respondent cited memoranda from the Division of Advice issued in the spring and summer of 2020 in support of the proposition that the COVID-19 pandemic should permit some employer discretion in implementing unilateral changes. Whether or not this is the correct interpretation of such memoranda is beside the point—Division of Advice memoranda have no precedential value, and I need not consider such.

[40] I note that no evidence was introduced as to when these changes were rescinded.

since Respondent's message made clear that April 29 would be Desborough's last day. *Sutter Health Central Valley* Region, 362 NLRB 1833 (2015). Thus, although limited and truncated bargaining took place over those 5 days, the Union was already boxed-in about a decision that had already been made and was thus limited to bargaining only about the effects of the layoff, not the decision itself. As with the unilateral changes discussed above, Respondent has not established that it found itself in a dire financial situation or some other type of exigent circumstances that would justify and excuse its conduct. *RBE Electronics of S.D.*, 320 NLRB 80 (1995).

Accordingly, and for the above reasons, I find that Respondent violated Section 8(a)(5) and (1) of the Act by not affording the Union the opportunity to bargain about its decision to lay off Desborough.

CONCLUSIONS OF LAW

1. Airgas USA, LLC (Respondent) is an employer engaged in commerce withing the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales, Industrial and Allied Workers Local 848 (the Union) is a labor organization within the meaning of Section 2(5) of the Act and has at all times material herein been the certified exclusive collective- bargaining representative for purposes of collective bargaining of Respondent's employees in the following described unit:

   > Included: All full-time and regular part-time route drivers, distribution drivers, inventory specialists and dispatchers with commercial driver licenses employed by Respondent working out of its facility currently located at 10675 Vanowen St., Burbank, CA; Excluded: All other employees, office clericals, professional employees, confidential employees, managerial employees, guards, and supervisors as defined by the Act, as amended.

3. Respondent violated Section 8(a)(3) and (1) of the Act by failing to grant or withholding the across-the-board October 2018 wage increase to the bargaining unit employees at the Burbank facility.

4. Respondent violated Section 8(a)(5) and (1) of the Act by failing to give the Union notice or the opportunity to bargain with regard to changing its drivers' schedules, reducing their number of hours of work, and reducing their overtime work.

5. Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about the decision to lay off Cameron Desborough.

6. The unfair labor practices committed by Respondent, as described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the Section 8(a)(5), (3), and (1) violations I have found is an order requiring Respondent Airgas USA, LLC to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, I recommend that Respondent be ordered to cease and desist from withholding its October 2018 wage increase to the bargaining unit employees; to cease and desist from reducing the hours of work of bargaining unit employees, changing their working schedules, reducing the amount of overtime work they are offered, or otherwise changing the terms and conditions of employment of bargaining unit employees, without first notifying the Union and providing the Union with the opportunity to bargain; and to cease and desist from laying off bargaining unit employees without first notifying the Union and affording the Union an opportunity to bargain about the decision to lay off such individual(s). I shall also recommend that Respondent be ordered to cease and desist, in any other manner, from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

Having found that Respondent violated Section 8(a)(3) and (1) by discriminatorily denying the bargaining unit employees the October 2018 wage increase I recommend that Respondent be ordered to make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them. Backpay shall be computed as in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, I recommend that Respondent be ordered to compensate unit employees for any adverse tax consequences of receiving a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 31 allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). I shall also recommend that Respondent be ordered to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.[41]

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to give the Union notice or the opportunity to bargain with regard to changes in the drivers' work schedules, reducing their number of hours of work, and reducing their overtime work, I recommend that upon request of the Union, Respondent be ordered to rescind these changes, to the extent it has not already done so, and to bargain with the Union about such changes. I further recommend that Respondent be ordered to make employees whole for any losses suffered by them by reason of these unilateral changes, in the manner set forth above.

[41] See *Omni Hotels Management Corp.*, 371 NLRB No. 53, slip op. at 6 fn. 17 (2022).

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally laying off Cameron Desborough without bargaining with the Union, I recommend that Respondent be ordered to offer Desborough full and immediate reinstatement to his former or substantially employment, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of Respondent's unlawful conduct, less any net interim earnings, plus interest. Backpay shall be computed as in *F. W. Woolworth Co.*, supra, plus interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, I recommend that Respondent be ordered to compensate Desborough for any adverse tax consequences of receiving a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 31 allocating the backpay awards to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, supra. I shall also recommend that Respondent be ordered to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Desborough's W-2 form(s) reflecting the backpay award. Finally, I recommend that Respondent be ordered to remove from its files any reference to the unlawful layoff of Desborough, and within 3 days thereafter notify him that this has been done and that his unlawful layoff will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

Airgas USA, LLC, [city, state] its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Withholding the October 2018 wage increase from the bargaining unit employees;

   (b) Reducing the working hours of bargaining unit members, changing their work schedules, reducing the amount of overtime offered to them, or otherwise changing the terms and conditions of employment of bargaining unit employees, without first notifying the Union and providing the Union with the opportunity to bargain;

   (c) Laying off bargaining unit members without first notifying the Union and providing the Union with the opportunity to bargain.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[42] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Make whole the bargaining unit employees for any loss of earnings or other benefits as a result of their failure to receive the October 2018 wage raise, in the manner set forth in the remedy section above.

(b) Make whole the bargaining unit employees for the loss of any earnings or other benefits suffered as a result of the reduction in their work hours, change of work schedules, or reduction in the mount of overtime work offered, in the manner set forth in the remedy section above.

(c) To the extent that it has not already done so, rescind the unilateral changes described in section (b) above, and notify and upon request bargain with the Union prior to making any changes to the terms and conditions of bargaining unit employees.

(d) Offer Cameron Desborough full and immediate reinstatement to his former or substantially employment, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of his unlawful layoff.

(e) Remove from its files any reference to the unlawful layoff of Desborough, and within 3 days thereafter notify him that this has been done and that his unlawful layoff will not be used against him in any way.

(f) Within 14 days after service by the Region, post at all its facility in Burbank, California, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[43] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail,

[43] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notice may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent/Employer customarily communicates with its employees by electronic means. If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" Shall Read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 29, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. February 25, 2022

Ariel L. Sotolongo
Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT refuse to grant employees a wage raise because they have joined or otherwise supported the International Brotherhood of Teamsters Wholesale Drivers, Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales, Industrial, and Allied Workers Local 848 (the Union).

WE WILL NOT reduce the working hours of bargaining unit members, change their work schedules, reduce the amount of overtime offered to them, or otherwise change the terms and conditions of employment of bargaining unit employees, without first notifying the Union and providing the Union with the opportunity to bargain.

WE WILL NOT lay off bargaining unit members without first notifying the Union and providing the Union with the opportunity to bargain.
WE WILL NOT in any like or related matter interfere with, restrain, or coerce you in the exercise of rights listed above.

WE WILL make whole the bargaining unit employees for any loss of earnings or other benefits as a result of their failure to receive the October 2018 wage raise.

WE WILL make whole bargaining unit employees for the loss of any earnings or other benefits suffered as a result of the reduction in their work hours, change of work schedules, or reduction in the mount of overtime work offered.

WE WILL offer Cameron Desborough full and immediate reinstatement to his former or substantially employment, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of his unlawful layoff.

WE WILL remove from our files any reference to the unlawful layoff of Desborough, and within 3 days thereafter notify him that this has been done and that his unlawful layoff will not be used against him in any way.

AIRGAS USA, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1150 West Olympic Boulevard, Suite 600 Los Angeles, CA 90064-1824
(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/31-CA-226568 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (310) 307-7342.